BEFORE THE
OFFICE OF ADMINISTRATIVE HEARINGS
SPECIAL EDUCATION DIVISION
STATE OF CALIFORNIA

In the Consolidated Matters of:	
STUDENT, Petitioner, v. CORONA-NORCO UNIFIED SCHOOL DISTRICT, Respondent,	OAH NO. N2006010253
AND	
CORONA-NORCO UNIFIED SCHOOL DISTRICT, Petitioner, v. STUDENT, Respondent.	OAH NO. N2006010639

DECISION

Administrative Law Judge (ALJ), Trevor Skarda, Office of Administrative Hearings (OAH), Special Education Division, State of California, heard this matter on March 20-24, 2006, in Norco, California.

Petitioner/Respondent Student (Student) was represented by attorney Ralph Lewis. Student's parents, Mother and Father, each attended the hearing on Student's behalf. Student did not attend the hearing.

Respondent/Petitioner Corona-Norco Unified School District (District) was represented by attorney Diane M. Willis. Penny L. Valentine, Administrative Director of Special Education, attended the hearing on behalf of the District.

Student called the following witnesses to testify: Barbara Bullard, teacher at the Prentice School; Charles Gustafson, school psychologist in the District; Vicki Butler, coordinator of special education on in the District; Lynda Gooszen, learning specialist at the Prentice school; Leonard Kaufman, coordinator of special education in the District; Gary Knowles, special education teacher at Norco High School; Josephine Yvonne McFadzen, assistant principal in the District; Mother; and Robert Patterson, Psy.D.

District called the following witnesses to testify: Penny Valentine; Gary Knowles; Scott Morgan, special education teacher at Norco High School; Karen Lerner, Jr. High School principal at Prentice School; Nathan Hunter, clinical psychologist.

Student's original due process request was filed on October 11, 2005. On January 6, 2006, the Student filed a Third Amended due process complaint.[1] On January 19, 2006, the District filed a request for a due process hearing. On February 10, 2006, ALJ Trevor Skarda conducted a telephonic trial setting conference. At the trial setting conference, ALJ Skarda granted District's motion to consolidate the two hearing requests. On March 9, 2006, ALJ Skarda conducted a telephonic prehearing conference and issued a prehearing conference order. Sworn testimony and documentary evidence were received at the hearing on March 20-24, 2006. Upon receipt of the written closing arguments, the record was closed on April 12, and the matter was submitted.

ISSUES[2]

1. Did the District deny Student a free and appropriate public education (FAPE) from December 2004 through June 2005 because of one or more of the following procedural violations related to the December 3, 2004 individualized education program (IEP):

   (a) all required IEP team members were not present;
   (b) the then present levels of performance were inaccurate;
   (c) the goals and objectives were not measurable;
   (d) the District failed to discuss the continuum of program options; and
   (e) the District failed to provide Student's parents with prior written notice of its decision to change Student's placement to Norco High School?

[1] The District filed a notice of insufficiency to the original complaint, the objection was sustained, and Student was permitted to file an amended complaint. Student filed a first amended complaint on November 7, 2005. The District filed a second notice of insufficiency, the objection was sustained, and Student was permitted to file a second amended complaint. Student filed a second amended complaint on December 5, 2005, and the District filed a notice of insufficiency. The second amended complaint was deemed insufficient and Student was permitted to file a third amended complaint. The District filed a notice of insufficiency to the third amended complaint, and the objection was overruled.

[2] For purposes of clarity and organization, the ALJ has reorganized Student's issues as identified in Student's third amended due process hearing request and as clarified at the telephonic prehearing conference.

2. Should the District be permitted to assess Student, and was Student no longer entitled to a FAPE as of June 2, 2005 because of his parent's refusal to allow the District to assess Student?

3. Did the District fail to offer Student appropriate extended school year (ESY) services for the summer of 2005?

4. Did the District deny Student a FAPE during the 2005-2006 school year because the following aspects of the June 2005 IEP were inappropriate:

   (a) the goals and objectives which addressed the unique need areas of organization, reading and written expression were vague and not measurable;
   (b) the IEP failed to address multiple areas of unique need;
   (c) the SRA Corrective reading program was inappropriate for Student;
   (d) the Norco High School teachers were not qualified; and,
   (e) the proposed placement at Norco High School was inappropriate

5. If the District denied Student a FAPE for the 2005-2006 school year, is Student entitled to placement at a State-certified nonpublic school (NPS) for two years from the date of this decision?

CONTENTIONS OF THE PARTIES

The Student contends that the District committed multiple procedural violations in conjunction with the December 2004 IEP team meeting. Student requests an order requiring the District to revise the December 2004 IEP and adopt present levels of performance from a private assessment report drafted in the summer of 2005. The District contends that the December 2004 IEP was appropriate.

The District proposed to assess Student beginning in April 2005. Parent refused to allow the District to assess Student. The District contends that conditions warrant a reassessment of Student and it requests an order allowing the District to assess Student pursuant to its assessment plan.[3] Moreover, the District contends that because Student's parents refused to consent to the assessment beginning in April 2005, Student was not entitled to a FAPE after June 2, 2005.

Student contends that the District failed to offer Student ESY during the summer of 2005. Student requests reimbursement for the cost of Student's attendance at the Winston School during the summer of 2005. The District contends that Student was not eligible for ESY services.

[3] On the March 22, 2006, during cross examination of Mother, Student stipulated that the District had the right to assess Student, and she consented to the last of several assessment plans submitted to Student's parents by the District.

Finally, Student contends that the June 2005 IEP was procedurally and substantively inappropriate. Student requests placement at Pine Ridge, a private school located in Vermont, which is not certified by the State of California, or a similar certified placement, for a period of two years from the date of this decision.[4] The District contends that because Student refused to agree to the April 2005 assessment plan Student was not entitled to a FAPE as of June 2, 2005. In the alternative, District argues that its offer of placement at Norco High School was a FAPE.

FACTUAL FINDINGS

Jurisdictional Matters

1. Student is a fifteen-year-old ninth-grade pupil who resides with his parents within the geographical boundaries of the Respondent District. He is eligible for special education and related services as a student with a specific learning disability (SLD) and has been diagnosed as dyslexic. Student has not attended public school during the current (2005-2006) school year. He currently attends a private parochial school.

Factual Background

2. Student attended the eighth grade at the Prentice School, a State certified nonpublic/nonsectarian school, during the 2004-2005 school year. The Prentice School serves students through grade eight.

The December 3, 2004 IEP

3. The District convened Student's annual IEP team meeting on December 3, 2004, at the Prentice School. The IEP proposed to continue Student's educational placement at the Prentice School through the end of the 2004-2005 school year. It also stated that another IEP team meeting would be held in May 2005 "to discuss Student's transition" to public high school for the 2005-2006 school year. Student's parents never signed the IEP.

IEP Team Members

4. Student contends that no special education or regular education teacher was present at the December 3, 2004 IEP team meeting. Karen Lerner, assistant principal at the Prentice School, Mother, and Mary Oliver, special education teacher at the Prentice School, were physically present at the IEP team meeting. Leonard Kaufman, coordinator of special education in the District, participated via telephone.

[4] The District moved to strike Student's request for Pine Ridge because it is not a State-certified NPS. Student did not dispute that Pine Ridge is not certified by the State of California. ALJ Skarda granted the District's motion to strike the request for placement at Pine Ridge because Pine Ridge is not certified by the State of California. (Ed. Code § 56505.2.)

5. Student failed to establish that no special education teacher was present at the IEP team meeting. Although Mother did not believe that Ms. Oliver was present, both Ms. Lerner and Mr. Kaufman testified and established that she was present. Ms. Oliver signed the IEP the day of the meeting. There was no procedural violation.

6. Student established, however, that no regular education teacher was present at the meeting. As such, the District committed a procedural violation.

7. As discussed in Legal Conclusion 3, only procedural violations that result in lost educational opportunity to the student or that seriously infringe on the parents' right to participate in the IEP process result in a FAPE denial. Student failed to establish that the procedural violation of not securing the attendance of a regular education teacher at the December 3, 2004 IEP team meeting resulted in lost educational opportunity to Student. Student stipulated that he received appropriate educational services while attending Prentice School from December 2004 through the end of the 2004-2005 school year.

8. Student similarly failed to establish that the procedural violation seriously infringed on the Student's parents right to participate in the IEP process. First, it was not disputed by the Student that his program and services provided him a FAPE in the "least restrictive environment," i.e., Student was educated with his typically developing, non-disabled peers to the maximum extent appropriate. As such, a regular education teacher's input regarding additional interaction with nondisabled peers was not necessary. Moreover, the District convened another IEP team meeting in June 2005 for the purpose of discussing Student's transition to public school from the NPS.[5] A teacher with a regular education credential who was knowledgeable about regular education classes at Norco High School, Jason Ramirez, was present at the June 2005 IEP team meeting. Accordingly, although the District committed a procedural violation, it was a harmless error and Student was not denied a FAPE.

The Present Levels of Performance

9. Student contends that the then-present levels of performance contained in the December 3, 2004 IEP were not accurate. Student requests an order requiring the District adopt present levels of performance from a private assessment report first provided to the District in March 2006.

10. Karen Lerner, assistant principal at Prentice School, drafted the then-present levels of performance in December 2004 in the areas of organization (homework completion), basic reading, reading comprehension, spelling and written expression. Before she drafted the present levels of performance, she obtained input from Student's teachers at Prentice School, and she reviewed Wechsler Individual Achievement Test (WIAT) scores obtained in a May 2004 assessment conducted by the Prentice School. In the area of

[5] The District made multiple attempts to convene an IEP team meeting beginning in April 2005.

organization, the IEP states that "[Student] was put on homework level 1 … due to his inability to turn in homework in a timely fashion." In all other areas, the IEP includes a narrative as well as a corresponding WIAT academic achievement score from the Prentice School's May 2004 administration of that test.

11. Student's expert witness, Dr. Robert Patterson, testified generally that the recited present levels of performance were not accurate as of December 2004. Dr. Patterson administered a full psycho-educational battery of tests to Student in March and June of 2005.

12. The District established that the recited present levels of performance were accurate based on information known to the District as of December 2004. Karen Lerner's testimony that the levels of performance were accurate as of December 2004 was given more weight than that of Dr. Patterson. Dr. Patterson failed to talk to any of Student's teachers at any time regarding Student's present levels of performance. In contrast, Karen Lerner spoke to the teachers who were providing services to Student on a daily basis. There was no procedural error with regard to the statement of recited present levels of performance in the December 2004 IEP.

Goals and Objectives

13. The December 2004 IEP contains goals and short-term objectives/benchmarks in the areas of organization (homework completion), basic reading, reading comprehension, spelling and written expression. Student contends that the goals and objectives/benchmarks are not measurable.

14. Student's annual goal in the area of basic reading is "when given a narrative or expository reading passage at grade level, [Student] will read the passage with appropriate pacing, intonation and expression." The corresponding benchmarks are percentages at three intervals: 70 percent as of March 2005, 75 percent as of June 2005, and 80 percent as of November 2005. The "method" of measurement is "Slingerland," the reading and written language methodology used at the Prentice School with all students.

15. Student established that the basic reading goal is not measurable by anyone other than Student's teachers at Prentice School who were utilizing the Slingerland methodology. Student's teachers at Prentice School explained that they could measure Student's progress on this goal because they are familiar with the Slingerland methodology. However, anyone utilizing a different methodology cannot ascertain how much progress Student is expected to make in one academic year because, e.g., it is unclear if "reading passage at grade level" refers to Student's actual grade level (Student was in the eighth grade) or functioning grade level (Student was reading at an early third-grade level). It is similarly unclear from the annual goal what "appropriate pacing, intonation and expression" describes. The benchmarks are equally confusing. Only someone familiar with Slingerland can determine if Student has achieved, e.g., "70 percent" of the annual goal by March 2005.

16. Dr. Patterson testified persuasively that this goal, as well as the remaining goals, was written to be implemented utilizing Slingerland. As a result, any school not using Slingerland would be unable to track Student's progress (or lack thereof) during the course of the year. Dr. Patterson's testimony was supported by letters written by the District as well as the June 2, 2005 IEP which state that new goals and corresponding short-term objectives/benchmarks would have to be drafted and adopted *after* Student began attending Norco High School in September 2005. If the goals and objectives/benchmarks drafted in December 2004 were appropriate, i.e., if they could be implemented by anybody qualified to teach Student, Norco High School would not need to develop new goals and objectives/benchmarks.

17. All of the remaining goals and short-term objectives/benchmarks follow the same basic pattern – the annual goal includes a generalized statement, the benchmarks are percentages measured at intervals, and the "method" of measurement is "Slingerland." For the identical reasons discussed above, the remaining goals and objectives were not measurable. As such, the District committed a procedural violation.

18. Student failed to establish that this procedural violation resulted in lost educational opportunity to Student. Again, Student stipulated that he received appropriate educational services at Prentice School from December 2004 through the end of the 2004-2005 school year. As such, Student lost no educational opportunity because of the poorly-drafted goals and short-term objectives/benchmarks.

19. Moreover, Student failed to establish that the procedural violation seriously infringed on the Student's parents' right to participate in the IEP process. Student provided no evidence or argument on this point. Therefore, the procedural violation did not result in a denial of FAPE, i.e., the procedural violation was harmless.

Continuum of Program Options

20. Student contends that the District did not "discuss" the continuum of program options at the December 3, 2004 IEP team meeting. The District was not required to discuss the "continuum of program options" at the meeting. Rather, the District was required to ensure that a continuum of program options was available to meet the needs of all students. (Ed. Code § 56360.)

21. Student failed to establish that the District failed to have available a continuum of program options to meet the needs of children such as Student. The team considered general education, special education, and ultimately placed Student in a non-public school. There was no procedural violation.

Prior Written Notice of Placement at Norco High School for the fall of 2005

22. Student contends that the District failed to provide "prior written notice" of its intent to change Student's placement to Norco High School at the December 3, 2004 IEP

team meeting. (34 C.F.R. § 300.503(a).) Prior written notice is required whenever, e.g., a local educational agency proposes to, or refuses to, change the educational placement of a child. (*Id.*)

23. Student failed to establish that the District proposed to change Student's placement at the December 3, 2004 IEP team meeting to Norco High School. The IEP states that Student's placement at Prentice School would continue for the remainder of 2004-2005 school year and that *another* IEP team meeting would be held to discuss Student's transition to public school. Because the District did not propose to change, or refuse to change, Student's placement from Prentice School at the December 3, 2004 IEP team meeting, it was not required to provide prior written notice to Student's parents. There was no procedural violation.

District's Right to Assess Student/Student's Right to a FAPE after June 2, 2005

24. The District's primary contention at hearing was that Student's parents' refusal to consent to its proposed assessment plan dated April 18, 2005, and two subsequent assessment plans, prevented the District from obtaining the information necessary to complete Student's IEP and to develop an offer of FAPE for Student beginning June 2, 2005.[6]

25. In March 2005, Student's parents wrote a letter to the District refusing to consent to the December 2004 IEP. The District subsequently communicated with Student's parents' via email and telephone regarding their concerns and the reasons they refused to consent to the December 2004 IEP.

26. Beginning in March 2005, parents retained Dr. Robert Patterson to complete a private psycho-educational assessment of Student. Dr. Patterson completed testing in June 2005 and drafted a report in July 2005. Parents first informed the District of Dr. Patterson's assessment in October 2005, although they refused to provide the District with a copy of the report at that time. The parents did not provide a copy of the assessment report to the District until March 2006.

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[6] The District argued in the alternative that its offer of June 2, 2005, was a FAPE for Student, despite the lack of goals and objectives or current information about Student's then-present levels of performance. It is not necessary to determine whether the District's offer of Norco High School and the SRA Corrective Reading Program was a FAPE because, as determined below, Student was not entitled to a FAPE after June 2, 2005. Nonetheless, the ALJ notes that the District's argument is not supported by the law. The IEP team must first determine a child's present levels of performance (including how the child's disability affects the child's involvement and progress in the general curriculum) and then it must develop measurable annual goals, including benchmarks or short-term objectives related to meeting the child's unique needs. (20 U.S.C § 1414(d); 34 C.F.R. §300.347.) Only after goals and objectives/benchmarks have been developed may the IEP team determine placement and services. This is because placement and services must be designed to allow the student to "advance appropriately toward attaining the annual goals." (*Id.*) If the IEP team does not know what the goals are, it cannot determine what services and placement are necessary to allow the child to achieve those goals.

27. On April 18, 2005, Leonard Kaufman drafted an assessment plan and submitted it to Student's parents for their consent. Mr. Kaufman drafted the assessment plan in order to obtain present levels of functioning in preparation for the upcoming IEP team meeting regarding Student's transition from Prentice School to a public school placement. Student had not attended a public school in the District for almost two full school years, and the District had not assessed the Student during that period. Additionally, Mr. Kaufman drafted the assessment plan because Student's parents rejected the December 2004 IEP, including the goals and short-term objectives benchmarks and the recited present levels of performance. The assessment plan proposed to assess Student in the areas of academic achievement and perceptual motor development. The proposed assessment also included observations and a record review.

28. Dr. Kaufman attempted multiple times to schedule IEP team meetings beginning in April 2005 to discuss, in relevant part, the unsigned December 2004 IEP, Student's transition from Prentice School, and Student's then present levels of functioning. Student's parents were initially uncooperative, although they eventually agreed to attend an IEP team meeting.

29. On May 10, 2005, the District informed Student's parents that it would not be able to develop goals and objectives at the upcoming IEP team meeting because Student's parents had refused to consent to the District's proposed assessment.

30. On June 2, 2005, the District convened an IEP team meeting to discuss Student's transition from Prentice School to a public school placement, the District's request to assess Student to determine his then present levels of functioning, and the development of goals and objectives. Student's parents were present with their attorney. The IEP team was unable to draft goals and objectives because Student's parents refused to consent to the District's assessment plan. Despite its inability to draft goals and objectives or to determine then present levels of performance, the District offered Norco High School to Student beginning in September 2005. The District offered to draft goals and objectives after Student attended Norco High School or after Student's parents allowed the District to complete its proposed assessment of Student. The District did not offer Student extended school year (ESY) services for the summer of 2005. The District again requested to assess Student and Student's parents declined. Neither Student's parents nor their attorney informed the District of Dr. Patterson's psycho-educational evaluation at the IEP team meeting.[7] Student's parents refused to consent to the IEP.

31. Student's parents drafted a dissent which was attached to the June 2, 2005 IEP. The hand-written dissent indicates, in pertinent part, that they disagreed with "placement and goals and objectives."

[7] Mother testified that she said nothing about the private assessment because nobody asked her.

32. On June 20, 2005, the District forwarded to Student's parents another assessment plan proposing to assess Student in the same areas (academics and perceptual-motor development) as the April 18, 2005 assessment plan. The letter accompanying the assessment plan states that the information obtained from the proposed assessment information is necessary to "evaluate [Student's] current areas of need and provide him with the appropriate placement and services."

33. On October 11, 2005, Student's parents requested a due process hearing. The complaint alleges, in part, that the District failed to develop goals and objectives, failed to develop accurate present levels of performance and fail to identify Student's unique needs.

34. On August 4, 2005, the District sent another letter to Student's attorney and parents requesting that they consent to the District's assessment plan.

35. School started in September 2005. Student did not attend school, public or private, at the start of the school year.

36. On November 30, 2005, the District submitted another assessment plan to the Student's parents. The District proposed to assess Student in all areas of suspected disability, including academic achievement, cognitive development, perceptual-motor development, language/speech development, social/emotional/behavioral development, attention and organization and health development. The purpose of the assessment was to obtain then current levels of academic performance and to examine Student's unique needs.

37. On January 19, 2006, after the winter break, the District filed a request for a due process hearing. The purpose of the request was to obtain consent to assess Student.

38. On March 22, 2006, the third day of hearing in the instant matter, Student stipulated that the District had the right to assess and signed the District's assessment plan.

39. As determined above in Factual Findings 24 through 39, Student's parents and their attorney refused to allow the District to assess Student beginning in April 2005. Because they refused to allow the District to assess Student, the IEP team was unable to complete the IEP process on June 2, 2005. Accordingly, as discussed in Legal Conclusions 18 and 19, Student was not entitled to a FAPE beginning June 2, 2005.

LEGAL CONCLUSIONS

Applicable Law

1. Pursuant to California special education law, the Individuals with Disabilities in Education Act (IDEA), and the Individuals with Disabilities in Education Improvement Act of 2004 (IDEIA), children with disabilities have the right to a FAPE that emphasizes special education and related services designed to meet their unique needs and to prepare

them for employment and independent living. (Ed. Code § 56000.) FAPE consists of special education and related services that are available to the student at no charge to the parent or guardian, meet the State educational standards, include an appropriate school education in the State involved, and conform to the child's IEP. (20 U.S.C. § 1401(8)(IDEA 1997); 20 U.S.C. § 1402(9)(IDEIA 2004).) "Special education" is defined as specially designed instruction, at no cost to parents, to meet the unique needs of the student. (20 U.S.C. § 1401(25)(IDEA 1997); 20 U.S.C. § 1402(29) (IDEIA 2004).)

2. In *Board of Educ. of the Hendrick Hudson Central Sch. Dist. v. Rowley* (1982) 458 U.S. 176, 200, 102 S.C. 3034, the United States Supreme Court addressed the level of instruction and services that must be provided to a student with disabilities to satisfy the requirement of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit, but that the IDEA does not require school districts to provide special education students with the best education available or to provide instruction or services that maximize a student's abilities. (*Id*. at 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services which are individually designed to provide educational benefit to the student. (*Id*. at 201.)

3. The Supreme Court in *Rowley* also recognized the importance of adherence to the procedural requirements of the IDEA. However, procedural flaws do not automatically require a finding of a denial of a FAPE. Procedural violations may constitute a denial of FAPE only if the procedural violation resulted in lost educational opportunity to the child, or if it seriously infringed upon the parents' opportunity to participate in IEP process. (*W.G. v. Board of Trustees of Target Range School District No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)[8]

4. An IEP is a written statement that must be developed, reviewed, and revised for each student with a disability. (34 C.F.R. § 300.340(a); Ed. Code § 56345.) The IEP must include a statement of the child's present levels of educational performance, including how the child's disability affects the child's involvement and progress in the general curriculum (i.e., the same curriculum as for nondisabled children). The IEP must also include a statement of the goals and short-term objectives/benchmarks, of the special education and related services, and of the program modifications or supports for school personnel that are to be provided to enable the student to be involved in and progress in the general curriculum, and to be educated and participate with disabled and nondisabled peers in extracurricular and other nonacademic activities. (20 U.S.C. § 1414(d)(1)(A); 34 C.F.R. § 300.347; Ed. Code §§ 56343, 56345.)

[8] The reauthorized Individuals with Disabilities Education Improvement Act of 2004, effective July 1, 2005, includes a similar "harmless error" analysis. (20 U.S.C. § 1415(f)(3)(E)(ii).)

5. An IEP team must include, in pertinent part, one or both of the pupil's parents, at least one general education teacher if the pupil is or may be participating in the general education environment, and at least one special education teacher or provider. (34 C.F.R. § 300.344(a); Ed. Code § 56341(b).)

6. Local educational agencies must ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education and related services. (Ed. Code § 56360.)

7. The Ninth Circuit Court of Appeal has endorsed the "snapshot" rule, explaining that the actions of the school cannot "be judged exclusively in hindsight…an IEP must take into account what was, and what was not, objectively reasonable when the snapshot was taken, that is, at the time the IEP was drafted." (*Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149, citing *Fuhrman v. East Hanover Bd. Of Education* (3rd Cir. 1993) 993 F.2d 1031, 1041.)

8. The petitioner has the burden of proving at an administrative hearing the essential elements of his claim. (*Schaffer v Weast* (2005) 546 U.S. ____ [126 S.Ct. 528, 163 L.Ed 2d 387].) In this consolidated case, the Student had the burden of proving that the District failed to offer Student a FAPE during the pertinent period, and the District had the burden of proving that it has the right to assess Student despite his parents' refusal to consent.

9. Special education students must be assessed in all areas related to their suspected disability, and no single procedure may be used as the sole criterion for determining whether the student has a disability or an appropriate educational program for the student. (20 U.S.C. § 1414 (a)(2), (3); Cal. Ed. Code § 56320, subd.(e), (f).) Tests and assessment materials must be administered by trained personnel in conformance with the instructions provided by the producer of such tests. (20 U.S.C. § 1414(a)(2), (3); Cal. Ed. Code § 56320, subd. (a), (b).)

10. A local educational agency must reevaluate a child with a disability if the child's parent or teacher requests an evaluation, every three years or if "conditions warrant a reevaluation." (34 C.F.R. § 300.536.)

12. If parents want their child to receive special education and related services, they are required to allow a local educational agency to assess their child. (*Gregory K. v. Longview School Dist.*, (9th Cir. 1987) 811 F.2d 1307, 1315.) Before a school system becomes liable for a special education placement of a student, it is entitled to up-to-date evaluative data and may insist on evaluation by qualified personnel it finds satisfactory. (*Lorraine Dubois v. Connecticut State Board of Education, et al.* (2nd Cir. 1984) 727 F.2d 44, 48.) A local educational agency is not required to rely solely on an independent evaluation and must be allowed to reassess a student itself – there is no exception to this rule. (*Wesley Andress v. Cleveland Independent School District* (5th Cir. 1995) 64 F.3d 176, 178.)

Determination of Issues

Issue 1(a): Did the District deny Student a free and appropriate public education (FAPE) from December 2004 through June 2005 because all required IEP team members were not present at the December 3, 2004 IEP team meeting?

13. As determined above in Factual Finding 6, no regular education teacher was present at the IEP team meeting. As discussed Legal Conclusion 3, a procedural violation results in a FAPE denial if it results in lost educational opportunity or if it seriously infringes on the parents' right to participate in the IEP process.[9] As determined in Factual Findings 7 and 8 the error did not result in lost educational opportunity to Student, nor did it seriously infringe on the parents' right to participate in the IEP process. Accordingly, the procedural error was harmless.

Issue 1(b) Did the District deny Student a free and appropriate public education (FAPE) from December 2004 through June 2005 because the present levels of performance in the December 3, 2004 IEP are inaccurate?

14. As determined in Factual Finding 12, there was no procedural violation.

Issue 1(c) Did the District deny Student a free and appropriate public education (FAPE) from December 2004 through June 2005 because the goals and objectives in the December 3, 2004 IEP are not measurable?

15. As determined in Factual Findings 15 and 17, the goals and short-term objectives/benchmarks were not measurable. However, as determined in Factual Findings 18 and 19 and as described in Legal Conclusion 3, the procedural error was harmless.

Issue 1(d) Did the District deny Student a free and appropriate public education (FAPE) from December 2004 through June 2005 because the District failed to discuss the continuum of program options at the December 3, 2004 IEP team meeting?

16. As determined in Factual Finding 21, there was no procedural error.

Issue 1(e) Did the District deny Student a free and appropriate public education (FAPE) from December 2004 through June 2005 because the District failed to provide Student's parents with prior written notice of its decision to change Student's placement to Norco High School at the December 3, 2004 IEP team meeting?

17. As determined in Factual Finding 23, there was no procedural error.

[9] The District argues that the Ninth Circuit recently changed the "harmless error" test to a "structural error" test in *M.L. v. Federal Way School District* (9th Cir. 2005) 394 F.3d 634. That decision was amended on January 14, 2005; the "harmless error" test was reinstated. (*Id.*)

Issue 2 Should the District be permitted to assess Student, and was Student no longer entitled to a FAPE as of June 2, 2005 because his parents refusal to allow the District to assess Student?

18. As determined in Factual Finding 38, Student conceded that the District had the right to assess Student. Student provided no explanation as to why he waited nearly one year to consent to the District's request for an assessment. Additionally, as determined in Factual Finding 26, during the period in which Student's parents refused to allow the District to assess their son, they were in the process of obtaining their own assessment in order to obtain the same information the District sought to obtain through its assessment – information about Student's academic functioning, unique needs and information necessary to draft goals and objectives. Moreover, instead of *sharing* the assessment results with the District, Student's parents actively concealed the fact that they had obtained a private assessment; indeed, they refused to even provide a copy of the resultant report to the District until March 2006 shortly before the instant hearing.[10]

19. As discussed in Legal Conclusion 12, parents who want their child to receive a FAPE must permit a local educational agency to assess their child. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F.2d 1307, 1315.) In the instant case, not only did Student's parents prevent the District from assessing their child, they concealed their own assessment from the District, effectively preventing the District from developing an offer of FAPE for Student. As previously explained, Student had not attended public school for two years at the time of the IEP team meeting, and the District had not conducted its own assessment during that period. For these reasons, Student was no longer entitled to a FAPE beginning June 2, 2005, the date of the IEP team meeting convened to discuss Student's transition from the non-public school to public school.

Issue 4 Did the District fail to offer Student appropriate extended school year (ESY) services for the summer of 2005?

20. As determined above in Legal Conclusion 19, Student was no longer entitled to a FAPE beginning June 2, 2005. Therefore, the District did not fail to offer or provide Student with appropriate ESY services during the summer of 2005.

Issue 5 Did the District deny Student a FAPE during the 2005-2006 school year because the following aspects of the June 2005 IEP were inappropriate: (a) the goals and objectives which address the unique need areas of organization, reading and written expression were vague and not measurable; (b) the IEP failed to address multiple areas of unique need;

[10] The ALJ notes that Student's primary allegations are essentially that the June 2, 2005 IEP was deficient because it lacked the very information the District sought to obtain through its own assessment – Student's present levels of performance and information necessary to draft appropriate goals and short-term objectives/benchmarks and to identify areas of unique need.

(c) the SRA Corrective Reading Program was inappropriate for Student;
(d) the Norco High School teachers were not qualified; and,
(e) the proposed placement at Norco High School was inappropriate

21. As determined above in Legal Conclusion 19, Student was no longer entitled to a FAPE beginning June 2, 2005. Therefore, the District did not deny Student a FAPE during the 2005-2006 school year.

Issue 6 If the District denied Student a FAPE for the 2005-2006 school year, is Student entitled to placement at a State-certified nonpublic school (NPS) for two years from the date of this decision?

22. Student did not prevail on any of Issues 1 through 5. Accordingly, Student is not entitled to any of the relief he seeks.

ORDER

23. In light of the above factual findings and legal conclusions, all of Student's requests for relief are denied.

24. As conceded by the Student on the third day of hearing, the District may assess Student pursuant to its November 2005 assessment plan, if it has not already done so.

25. If one has not already convened, within 15 business days after the assessments are completed, the District shall convene an IEP team meeting to discuss the assessments and to offer a FAPE to Student.

PREVAILING PARTY

26. Pursuant to California Education Code section 56507, subdivision (d), the hearing decision must indicate the extent to which each party has prevailed on each issue heard and decided. The following findings are made in accordance with this statute: *The District prevailed on all issues heard and decided.*

RIGHT TO APPEAL THIS DECISION

27. The parties to this case have the right to appeal this Decision to a court of competent jurisdiction. If an appeal is made, it must be made within ninety days of receipt of this decision. (Cal. Ed. Code § 56505, subd. (k).)

IT IS SO ORDERED THIS 6th DAY OF June 2006.

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TREVOR SKARDA
Administrative Law Judge
Office of Administrative Hearings
Special Education Division